Office - Supreme Court, U.S.
FILED
DEC 16 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-2359

In the Supreme Court of the United States

OCTOBER TERM, 1982

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, WESTERN ELECTRIC COMPANY, INC., AND BELL TELEPHONE LABORATORIES, INC., PETITIONERS

v.

PHONETELE, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

REX E. LEE
Solicitor General

WILLIAM F. BAXTER
Assistant Attorney General

ROBERT B. NICHOLSON
GEORGE EDELSTEIN
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether American Telephone and Telegraph Company enjoys antitrust immunity for conduct which neither the Communications Act of 1934 (47 U.S.C. 151 *et seq.*) nor the Federal Communications Commission required or approved.

TABLE OF CONTENTS

Page

Statement 1

Argument 4

Conclusion 13

TABLE OF AUTHORITIES

Cases:

Armour Packing Co. v. *United States*, 209 U.S. 56 7-8

AT&T, "Foreign Attachment" Tariff Revision, In re, 15 F.C.C.2d 605 9

Brotherhood of Locomotive Firemen & Enginemen v. *Bangor & A.R.R.*, 389 U.S. 327 12

Cantor v. *Detroit Edision Co.*, 428 U.S. 579 11

Essential Communications Systems, Inc. v. *AT&T*, 446 F. Supp. 1090, rev'd, 610 F.2d 1114 ..... 5, 6, 7

Georgia v. *Pennsylvania R.R.*, 324 U.S. 439 ..... 6, 7

Gordon v. *New York Stock Exchange*, 442 U.S. 659 ..... 3, 10

Group Life & Health Insurance Co. v. *Royal Drug Co.*, 440 U.S. 205 6

Hamilton-Brown Shoe Co. v. *Wolf Bros.* 240 U.S. 251 12

Hush-a-Phone Corp. v. *United States*, 238 F.2d 266, rev'g 20 F.C.C. 391, on remand, 22 F.C.C. 112 9

Page

Cases—Continued:

Interconnect Planning Corp. v. *AT&T*, 465 F. Supp. 811 5

Jarvis, Inc. v. *AT&T*, 481 F. Supp. 120 5

Jordaphone Corp., In re v. *AT&T*, 118 F.C.C. 644 9

Keogh v. *Chicago & N.W. R.R.*, 260 U.S. 156 ..... 7, 11, 12

Litton Systems, Inc. v. *AT&T*, 487 F. Supp. 942 5

MCI Communications Corp. v. *AT&T*, 462 F. Supp. 1072 5

Mid-Texas Communications Systems, Inc. v. *AT&T*, 615 F.2d 1372, cert. denied, 449 U.S. 912 5

National Gerimedical Hospital & Gerontology Center v. *Blue Cross*, 452 U.S. 378 ..... 5, 8, 11

Northeastern Telephone Co. v. *AT&T*, 651 F.2d 76 5

Pan American World Airways, Inc. v. *United States*, 371 U.S. 296 8

Proposals for New or Revised Classes of Interstate and Foreign Message Toll Telephone Service and Wide Area Telephone Service, First Report and Order, In re, 56 F.C.C.2d 593, on reconsideration, 57 F.C.C.2d 1216, 58 F.C.C.2d 716, 59 F.C.C.2d 83 2

Page

Cases—Continued:

Registration Decision, 56 F.C.C.2d at 598 .... 2, 10

Second Report and Order, 58 F.C.C.2d 736, on reconsideration, 61 F.C.C.2d 396, 64 F.C.C.2d 1058, aff'd, *North Carolina Utilities Commission* v. *FCC*, 552 F.2d 1036, cert. denied, 434 U.S. 874 2

Sound, Inc. v. *AT&T*, 631 F.2d 1324 5

Terminal Warehouse Co. v. *Pennsylvania R.R.*, 297 U.S. 500 11

United States v. *AT&T*, No. 74-1698 (D. D.C. Aug. 11, 1982) 4, 5, 12

United States v. *AT&T*, 427 F. Supp. 57, cert. denied, 429 U.S. 1071 and 434 U.S. 966 ..... 4, 5

United States v. *AT&T*, 461 F. Supp. 1314 ..... 4, 5

United States v. *Borden Co.*, 308 U.S. 188 ..... 5, 6

United States v. *National Association of Securities Dealers, Inc.*, 422 U.S. 694 .... 3, 5, 10

United States v. *Terminal Railroad Association*, 224 U.S. 383 7

United States Telephone Co. v. *Central Union Telephone Co.*, 202 F. Cas. 66 (No. 2,082), cert. denied, 229 U.S. 620 7

Use of the Carterfone Device in Message Toll Telephone Service, In re, 13 F.C.C.2d 240, 14 F.C.C.2d 571 ..... 1-2, 9

Page

Cases—Continued:

Use of Recording Devices in Connection with Telephone Service, In re, 11 F.C.C. 1033 9

Western Union Telegraph Co. v. *Esteve Bros.*, 256 U.S. 566 7

Statutes:

Capper-Volstead Act, Section 2, 7 U.S.C. 292 6

Clayton Act, 15 U.S.C. (1928 ed.) 21, as amended by the Communications Act, ch. 652, 48 Stat. 1102 6

Communications Act, 47 U.S.C. 201 *et seq.* :

Section 201(a), 47 U.S.C. 201(a) 7
Sections 203-205, 47 U.S.C. 203-205 7
Section 214, 47 U.S.C. 214 7
Section 221, 47 U.S.C. 221 7

Interstate Commerce Act, ch. 309, 36 Stat. 545 7

McCarran-Ferguson Act, Section 2(b), 15 U.S.C. 1012(b) 6

Transportation Act of 1920, ch. 91, 41 Stat. 456 6

Willis-Graham Act, ch. 20, 42 Stat. 27 7

15 U.S.C. (1970 ed.) 78s(b)(9) 10

Miscellaneous:

Memorandum of FCC as Amicus Curiae, 62 F.C.C.2d 1102 (1976) 5

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-2359

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, WESTERN ELECTRIC COMPANY, INC., AND BELL TELEPHONE LABORATORIES, INC., PETITIONERS

v.

PHONETELE, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's invitation to the Solicitor General to file a brief expressing the views of the United States.

STATEMENT

Phonetele is a small business that attempted to enter the market for telephone terminal equipment[1] following the Federal Communications Commission's decision in *In re*

---

[1]Telephone terminal equipment means equipment attached to telephone company lines at the customer's premises: e.g., standard telephones, automatic answering and recording devices, switchboards, key telephones.

Phonetele manufactures the "Phonemaster," a device that customers can attach to a telephone to restrict outgoing calls to predetermined area codes, exchange prefixes, or lines (Pet. App. A-98).

Use of Carterfone Device in Message Toll Telephone Service, 13 F.C.C.2d 420, reconsideration denied, 14 F.C.C.2d 571 (1968). In *Carterfone,* the Commission held that American Telephone & Telegraph's tariff prohibiting the interconnection of safe, customer supplied equipment violated the Communications Act. Following the decision in *Carterfone,* AT&T filed an amended tariff that permitted interconnection of customer provided acoustical and inductive terminal equipment, but that continued to prohibit the interconnection of equipment that generates network control signals[2] unless that equipment was connected by means of devices called protective connecting arrangements ("PCAs"), which were provided and installed by the telephone company. The Commission, in its *Registration Decision,*[3] held that the requirement of PCAs was unnecessary and violated the Communications Act by infringing the rights of telephone company customers to use their own equipment.

Phonetele brought this action against AT&T[4] in the United States District Court for the Central District of

---

[2] "Network control signals" are electronic impulses that are used to activate connections between telephone centers, to control switches, and to start and stop the equipment used for billing (Pet. App. A-30 n.19).

[3] *In re Proposals for New or Revised Classes of Interstate and Foreign Message Toll Telephone Service and Wide Area Telephone Service, First Report and Order,* 56 F.C.C.2d 593 (1975), on reconsideration, 57 F.C.C.2d 1216, 58 F.C.C.2d 716, 59 F.C.C.2d 83 (1976); *Second Report and Order,* 58 F.C.C.2d 736, on reconsideration, 61 F.C.C.2d 396 (1976), 64 F.C.C. 2d 1058, aff'd, *North Carolina Utilities Commission* v. *FCC,* 552 F.2d 1036 (4th Cir.), cert. denied, 434 U.S. 874 (1977). In this decision, the FCC prescribed technical standards and adopted a regulatory program for telephone equipment that satisfies those standards. Telephone companies are required, under the Commission's ruling, to allow interconnection of any registered equipment.

[4] It also sued Western Electric Company, AT&T's manufacturing subsidiary, and Bell Telephone Laboratories, AT&T's research arm. For convenience, we shall refer to the three petitioners as AT&T.

California, claiming that AT&T's unnecessary PCA requirement violated the federal antitrust laws. AT&T moved to dismiss the complaint on the ground that, because its allegedly anticompetitive conduct was described in a tariff on file with the FCC, it enjoyed complete antitrust immunity.

The district court dismissed the complaint (Pet. App. A-69 to A-78). The court stated that "if the federal antitrust laws are applied to the interconnection of customer owned telecommunications devices, the sophisticated regulatory program of the FCC will not work" (*id.* at A-74). It thus concluded that the antitrust laws and the Communications Act "are sufficiently mutually repugnant to compel the inference that Congress intended to repeal the antitrust laws otherwise applicable to the area of interconnection" (*ibid.*; footnote omitted).

The court of appeals reversed (Pet. App. A-1 to A-67). The court started from the premises that implied antitrust immunity is a question of congressional intent and that antitrust immunity will be inferred only where there is a " 'convincing showing of clear repugnancy between the antitrust laws and the regulatory system' " (*id.* at A-9, quoting *United States* v. *National Association of Securities Dealers, Inc.*, 422 U.S. 694, 719-720 (1975)).[5] It rejected AT&T's claims of blanket antitrust immunity based on "pervasive regulation" or "inconsistent" regulatory and antitrust standards (*id.* at A-11 to A-17), noting that the Commission and every other court of appeals that had considered the issue had similarly rejected AT&T's blanket

---

[5]The court explained that this Court's findings of implied antitrust immunity for the securities industry and stock exchange in *Gordon* v. *New York Stock Exchange*, 442 U.S. 659 (1975), and *United States* v. *National Association of Securities Dealers, Inc.*, *supra*, involved different statutes and different conduct (Pet. App. A-12 to A-13).

immunity claim (*id.* at A-2, A-26 n.1, A-37 n.44).[6] The court did hold, however, that if AT&T could demonstrate at trial that it reasonably and in good faith thought that the PCA requirement was necessary to protect the telephone system and was a reasonable means of doing so, it had a defense on the merits to Phonetele's antitrust suit (*id.* at A-19 to A-20, A-68). District Judge Claiborne dissented, essentially adopting the reasoning of the district court below (*id.* at A-46 to A-67).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with the decisions of this Court or the decisions of any other court of appeals. Moreover, the case is in an interlocutory posture, and petitioners have presented no convincing reason why this Court should depart from its customary practice of denying review in interlocutory cases.

1. The court of appeals' holding that AT&T does not enjoy antitrust immunity merely because it is subject to federal regulation is the latest in a series of decisions rejecting AT&T's sweeping immunity claims. AT&T presented the same arguments to this Court five years ago in an unsuccessful effort to obtain dismissal of the United States' monopolization suit. This court denied AT&T's petitions for certiorari. See *AT&T* v. *United States*, 429 U.S. 1071 (1977); *AT&T* v. *United States*, 434 U.S. 966 (1977). In

---

[6]The same conduct at issue here formed part of the United States' monopolization suit against AT&T. In that suit, as the court of appeals here observed (Pet. App. A-2, A-26 n.1), the district court also rejected AT&T's claim of immunity. *United States* v. *AT&T*, 461 F. Supp. 1314 (D.D.C. 1978); *United States* v. *AT&T*, 427 F. Supp. 57 (D.D.C. 1976), cert. denied, 429 U.S. 1071 and 434 U.S. 966 (1977). Judge Greene has twice subsequently found AT&T's implied immunity claims groundless — most recently in entering a consent judgment in which AT&T agreed to the divestiture of all of its local exchange monopolies. *United States* v. *AT&T*, No. 74-1698 (D. D.C. Aug. 11, 1982), slip op. 42.

addition, AT&T's contentions have been rejected by every court of appeals that has considered them. See *Northeastern Telephone Co.* v. *AT&T*, 651 F.2d 76 (2d Cir. 1981); *Sound, Inc.* v. *AT&T*, 631 F.2d 1324 (8th Cir. 1980); *Mid-Texas Communications Systems, Inc.* v. *AT&T*, 615 F.2d 1372 (5th Cir.), cert. denied, 449 U.S. 912 (1980); *Essential Communications Systems, Inc.* v. *AT&T*, 610 F.2d 1114 (3d Cir. 1979).[7] Moreover, the Federal Communications Commission also disagrees with AT&T's assertions of antitrust immunity.[8]

a. Whether AT&T enjoys antitrust immunity is essentially a question of congressional intent. See *National Gerimedical Hospital & Gerontology Center* v. *Blue Cross*, 452 U.S. 378, 388-389 (1981). *United States* v. *Borden Co.*, 308 U.S. 188 (1939). As this Court recently reiterated, " '[i]mplied antitrust immunity is not favored, and can be justified only by a convincing showing of clear repugnancy between the antitrust laws and the regulatory system.' " *National Gerimedical Hospital, supra*, 452 U.S. at 388, quoting from *United States* v. *National Association of Securities Dealers, Inc., supra*, 422 U.S. at 719-720. Thus, "where Congress did intend to repeal the antitrust laws, * * * this intent must be clear." *National Gerimedical Hospital, supra*, 452 U.S. at 389.

---

[7]The overwhelming majority of district courts that have considered AT&T's claims have also rejected them. See *Litton Systems, Inc.* v. *AT&T*, 487 F. Supp. 942 (S.D.N.Y. 1980); *MCI Communications Corp.* v. *AT&T*, 462 F. Supp. 1072 (N.D. Ill. 1978); *Interconnect Planning Corp.* v. *AT&T*, 465 F. Supp. 811 (S.D.N.Y. 1978); *Jarvis, Inc.* v. *AT&T*, 481 F. Supp. 120 (D.D.C. 1978); *United States* v. *AT&T*, 461 F. Supp. 1314 (D.D.C. 1978); *United States* v. *AT&T*, 427 F. Supp. 57 (D.D.C. 1976), cert. denied, 429 U.S. 1071 and 434 U.S. 966 (1977). But see the decision of the district court below (Pet. App. A-69 to A-78) and *Essential Communications Systems, Inc.* v. *AT&T*, 446 F. Supp. 1090 (D. N.J. 1978), rev'd, 610 F.2d 1114 (3d Cir. 1979).

[8]See *Memorandum of FCC as Amicus Curiae*, 62 F.C.C.2d 1102 (1976) in *United States* v. *AT&T*, No. 74-1698, *supra*.

The starting point of inquiry concerning congressional intent is the text of the statute, since Congress ordinarily expresses its intent to immunize conduct by an express statutory grant of immunity.[9] Congress did expressly grant antitrust immunity to telephone companies in Section 221 of the Communications Act, 47 U.S.C. 221, but that discrete immunity provision deals only with certain telephone company mergers approved by the FCC. While strictly limiting its express grant of antitrust immunity, Congress specifically provided in the Communications Act for the application of the Clayton Antitrust Act to communications carriers, and it authorized the FCC to enforce against such carriers the Clayton Act's provisions prohibiting anticompetitive conduct.[10] This combination in the text of the Communications Act of express antitrust enforcement authority against carriers and of limited antitrust immunity militates especially strongly against AT&T's claims of implied antitrust immunity.

The legislative history confirms the sense of the text. The Third Circuit carefully reviewed this history in *Essential Communications Systems, Inc.* v. *AT&T, supra,* 610 F.2d at 1117-1121. Briefly, federal regulation of both railroads and telephone companies prior to 1920 was harmonious with application of the antitrust laws to those carriers. *Id.* at

---

[9]Familiar examples are antitrust immunity for farmers' cooperatives when engaged in handling their produce, granted by Section 2 of the Capper-Volstead Act, 7 U.S.C. 292 (see *United States* v. *Borden Co., supra*), and antitrust immunity for the state regulated business of insurance, granted by Section 2(b) of the McCarran-Ferguson Act, 15 U.S.C. 1012(b). See *Group Life & Health Insurance Co.* v. *Royal Drug Co.*, 440 U.S. 205 (1979).

[10]See Section 602(d) of the Communications Act, ch. 652, 48 Stat. 1102, amending 15 U.S.C. (1928 ed.) 21. Cf. *Georgia* v. *Pennsylvania R.R.*, 324 U.S. 439, 456 (1945).

1117-1118.[11] And, although Congress, in the Transportation Act of 1920, ch. 91, 41 Stat. 456, substantially expanded regulation of railroads, it left communications carriers virtually untouched. 610 F.2d at 1118. Indeed, the lack of antitrust immunity for telephone companies required Congress in 1921 to enact the Willis-Graham Act, ch. 20, 42 Stat. 27, the precursor of the express immunity provision now found in Section 221 of the Communications Act. When in 1934 Congress enacted the Communications Act, it adopted the pre-1920 federal law respecting transportation common carriers,[12] with slight changes to make it applicable to communications companies. 610 F.2d at 1119-1120.[13] The result was in essence a consumer

---

[11]See, e.g., *United States* v. *Terminal Railroad Association*, 224 U.S. 383 (1912) (applying antitrust laws to regulated rail carriers). Since there was in this period less extensive regulation of communications companies than of railroads (see *Western Union Telegraph Co.* v. *Esteve Bros.*, 256 U.S. 566 (1921)), the antitrust laws of course applied to telephone companies as well. *United States Telephone Co.* v. *Central Union Telephone Co.*, 202 F. Cas. 66 (6th Cir.) (No. 2,082), cert. denied, 229 U.S. 620 (1913).

[12]Thus, the Act carried over the existing powers of the Interstate Commerce Commission to regulate telephone and telegraph companies, while adding a number of powers — e.g., the use of tariff filing and review procedures in Sections 203-205 (47 U.S.C. 203-205) — that the ICC had exercised over railroads since 1910 or earlier. The only significant grant to the FCC of a power newly conferred on the ICC by the Transportation Act of 1920 was contained in Section 214, a truncated version of the ICC's control over entry through licensing, an aspect of regulation not at issue in this case. Thus, the Communications Act, while expanding regulation of communications carriers, did not institute qualitative changes in the regulatory scheme anywhere near the magnitude of the changes that the Transportation Act made in railroad regulation. Moreover, the antitrust laws continued to apply even to railroads after 1920. *Keogh* v. *Chicago & N.W. R.R.*, 260 U.S. 156, 161-162 (1922); *Georgia* v. *Pennsylvania R.R.*, *supra*.

[13]E.g., the railroads' duty to provide "through routes" became the telephone companies' duty to "interconnect" with each other if ordered to do so by the Commission. Compare Section 201(a), 47 U.S.C. 201(a), with former Section 1 of the Interstate Commerce Act, ch. 309, 36 Stat. 545.

protection system "designed especially for the protection of telephone users * * * from discrimination in rates or service and from excess charges." *Id.* at 1120. See also *Armour Packing Co.* v. *United States,* 209 U.S. 56, 80 (1908). This system did not reflect a congressional intent to grant the agency comprehensive and exclusive authority to regulate telephone companies' relations with competitors or the structure of the industry generally.[14] And it did not preclude application of the antitrust laws, which plainly applied to common carriers prior to 1920.

In sum, the Communications Act's text and legislative history contemplate application of the antitrust laws to communications carriers. Thus, as the court of appeals correctly held (Pet. App. A-15), the only possible basis for implied immunity is an irreconcilable conflict, or plain repugnancy, between the Communications Act and Sherman Act as applied to the particular anticompetitive conduct at issue. See *National Gerimedical Hospital, supra,* 452 U.S. at 388-389. Such a conflict may be found only where the regulatory statute, or the regulatory agency, requires or expressly approves the precise anticompetitive conduct challenged under the antitrust laws. *Id.* at 389.

b. AT&T, however, does not claim that this case involves conduct that the Communications Act or the Commission required or approved. Indeed, the Communications Act protects customers from unreasonable restrictions on their use of telephone exchange service. It thus prohibits telephone companies from refusing to interconnect safe equipment purchased from competing manufacturers. Beginning in 1947, AT&T tariffs restricting customer freedom to

---

[14]Contrast *Pan American World Airways, Inc.* v. *United States,* 371 U.S. 296, 300-301 (1963).

interconnect non-AT&T equipment were repeatedly invalidated by the Commission and the courts.[15]

In addition, when the conduct at issue in this case — the unnecessary requirement of a protective connecting attachment —was set out in a 1968 tariff, the Commission subjected that tariff to investigation because of a "number of unresolved specific questions * * *". *In re AT&T, "Foreign Attachment" Tariff Revisions,* 15 F.C.C.2d 605, 610-611 (1968). See Pet. App. A-6 to A-7, A-30 n.21. The Commission expressly warned AT&T that its decision not to grant more relief at that time should not in any way be construed as approval of the tariff. 15 F.C.C.2d at 610. The Commission subsequently held the protective connecting attachment requirement violative of the Communications Act. In so ruling, the Commission emphasized that AT&T had failed, over a seven year period, to establish any of its factual claims that protective connecting attachments were necessary to prevent harm to its equipment or injury to its

---

[15]In *In re Use of Recording Devices in Connection with Telephone Service,* 11 F.C.C. 1033 (1947), the FCC rejected AT&T's effort to bar the connection of recording devices to telephone company equipment. In *In re Jordaphone Corp.* v. *AT&T,* 18 F.C.C. 644 (1954), the Commission held that AT&T's similar prohibition against connection of customer provided telephone answering devices was not required or even permitted under the Communications Act because it was discriminatory and unreasonable. The court in *Hush-a-Phone Corp.* v. *United States,* 238 F.2d 266, 269 (D.C. Cir. 1956), rev'g 20 F.C.C. 391 (1955), on remand, 22 F.C.C. 112 (1957), struck down, as a violation of the Communications Act, AT&T's broad prohibition against connecting harmless equipment made by others. And, in *In re Use of the Carterfone Device, supra,* the FCC ruled that a tariff restriction prohibiting all interconnection by any means and all "direct electrical connection" of customer provided equipment, no matter how safe, was unlawful because it prohibited the use of equipment "without regard to its effect upon the telephone system." 13 F.C.C.2d at 425; 14 F.C.C.2d at 573-574. The Commission in *Carterfone* urged AT&T to adopt technical standards that would identify those devices that might be harmful and allow the interconnection of all other equipment, which would be harmless to the telephone system. 13 F.C.C.2d at 425-426.

personnel. *Registration Decision, supra,* 56 F.C.C.2d at 598.[16]

As the foregoing discussion makes clear, the present case is radically different from *Gordon* v. *New York Stock Exchange,* 422 U.S. 659 (1975), where the Court held that the fixing of commission rates was impliedly immune. In so holding, the Court relied primarily on its finding that Congress had authorized such price fixing — otherwise a per se violation of the antitrust laws — when it authorized the Securities and Exchange Commission to make rules "fixing * * * reasonable rates of commission." 15 U.S.C. (1970 ed.) 78s(b)(9). See 422 U.S. at 667. This finding, combined with legislative history that showed congressional awareness of the stock exchange's long-standing practice of fixing commission rates and of the per se illegality of price fixing generally, led to the conclusion of implied immunity. The Court's similar examination of the statutory scheme and its conclusion that Congress intended to eliminate the secondary market in mutual fund shares through vertical price fixing subject to SEC control led the Court to a finding of implied antitrust immunity for such conduct in *United States* v. *National Association of Securities Dealers, Inc., supra.*[17]

c. Because there is no conflict between the antitrust laws and the regulatory scheme on the facts of the case, AT&T is forced to argue for blanket antitrust immunity on the basis

---

[16]AT&T argues (Pet. 16-17) that it required PCAs in a good faith though erroneous belief that they were necessary to protect its telephone lines. Phonetele disputes this (Br. in Opp. 5-7). This disagreement awaits resolution at trial.

[17]Moreover, here, in contrast to *Gordon* and *National Association of Securities Dealers,* the regulatory agency has concluded that the regulated entity (AT&T) does not enjoy antitrust immunity with regard to the particular practice at issue. See page 5 & note 8, *supra.*

of "pervasive" Commission regulation of communications (Pet. 20-23) and "inconsistent standards" under the Communications and Sherman Acts (Pet. 14-20). AT&T's contentions, however, are inconsistent with the text and legislative history of the Communications Act. See pages 5-8, *supra*.

Moreover, this Court has rejected the argument that, even in the absence of an actual conflict, a corporation is entitled to antitrust immunity merely because it is subject to "comprehensive" or "pervasive" Commission regulation. *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579, 595-598 (1976). Indeed, the Court has long held that, notwithstanding pervasive regulation, regulated common carriers are subject to the antitrust laws. See *Keogh* v. *Chicago & N.W. R.R.*, 260 U.S. 156, 161-162 (1922); *Terminal Warehouse Co.* v. *Pennsylvania R.R.*, 297 U.S. 500, 515-516 (1936); *Georgia* v. *Pennsylvania R.R.*, 324 U.S. 439, 456-460 (1945). More recently, the Court emphasized that such labels as "pervasive" or "substantial" regulation are no substitute for discriminating analysis of congressional intent in the context of particular facts. *National Gerimedical Hospital, supra*, 452 U.S. at 389.

AT&T's claim that, because the antitrust laws and the Communications Act differ, they are fatally "inconsistent" (Pet. 14-20) is also groundless. Regulatory statutes such as the Communications Act always promote values other than competition; if they did not, there would be little need for them. The appropriate inquiry is not whether the regulatory standards are the same as those of the antitrust laws but whether, as applied to the conduct in question, they are in conflict. As we have shown, there is no such conflict.[18]

---

[18]Should Phonetele prevail on the merits, a damage award to this competitor of AT&T would not interfere with the statutory policy of nondiscriminatory rates for customers underlying this Court's holding

2. This case is especially unworthy of review because the court of appeals' decision is interlocutory. In reversing the district court's order dismissing the action and remanding the case to the district court for further proceedings, the court of appeals has placed AT&T in the same position it would have been in if the district court had denied AT&T's motion to dismiss in the first instance. AT&T may yet prevail in the district court, or it may, as it has done in other cases of this sort, reach an amicable settlement. If AT&T becomes subject to an adverse final judgment in the district court and if the court of appeals affirms that judgment, AT&T will then be able to present its present contentions to this Court, together with any other claims it may have, in a petition for a writ of certiorari seeking review of that final judgment. Until then, however, review is premature, for "except in extraordinary cases, the writ [of certiorari] is not issued until final decree." *Hamilton-Brown Shoe Co.* v. *Wolf Bros.*, 240 U.S. 251, 258 (1916); *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & A.R.R.*, 389 U.S. 327, 328 (1967).

This case presents no extraordinary circumstances justifying departure from this Court's settled practice of denying review in interlocutory cases. The Court on two prior occasions has denied AT&T's petitions seeking interlocutory review of this issue. See page 4, *supra*. Certainly the expense of a trial is no reason to grant interlocutory review, especially when AT&T fully tried this interconnection issue on

---

in *Keogh* v. *Chicago & N.W. R.R.*, *supra*. Indeed, one of the important policies of the FCC's regulatory approach under the Communications Act in recent years has been the recognition that competition is in the public interest. This policy points strongly in favor of effective Sherman Act remedies for anticompetitive practices and tariff restrictions. See *United States* v. *AT&T*, No. 74-1698, *supra*, slip op. 63-64.

the merits last year in *United States* v. *AT&T*. Furthermore, at the present time there is no confusion about the law, for the courts of appeals uniformly have rejected AT&T's theory of implied immunity, as has the Federal Communications Commission.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

WILLIAM F. BAXTER
Assistant Attorney General

ROBERT B. NICHOLSON
GEORGE EDELSTEIN
Attorneys

DECEMBER 1982

DOJ-1982-12